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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOHN DAVID GANN, Defendant and Appellant.	C077898 (Super. Ct. Nos. 94F07904, 95F02375)

Defendant John David Gann appeals from the trial court's denial of his petition for resentencing pursuant to Penal Code section 1170.126.[1] He claims the trial court erred in finding him ineligible for resentencing and that we can reach his previously unarticulated claims of error because trial counsel rendered ineffective assistance in failing to argue—with respect to his statutory ineligibility—that the People needed to plead and prove that he "used or was armed with a deadly weapon," that a jury finding of that fact beyond a

[1] Undesignated statutory references are to the Penal Code.

reasonable doubt was required, and that his acquittal on the charge of assault with a deadly weapon in one case precluded a finding of ineligibility in that case. We will affirm the order denying defendant's petition.

FACTUAL AND PROCEDURAL BACKGROUND

We take the facts of defendant's crimes from our prior opinions affirming his convictions. (*People v. Gann* (Jan. 28, 1997, C020617) [nonpub. opn.] and *People v. Gann* (Jan. 20, 1998, C024163) [nonpub. opn.]; see *People v. Guilford* (2014) 228 Cal.App.4th 651, 660-661 [prior appellate opinion admissible to prove ineligibility in section 1170.126 proceeding] (*Guilford*).)

While defendant was incarcerated in a state prison, correctional officers searched his cell, of which he was the sole occupant, and found a sharpened stabbing weapon in the mattress. He was convicted by a jury, in case No. 94F07904, of possession of a sharp instrument by a state prisoner. He was sentenced to state prison for a term of 25 years to life pursuant to the three strikes law.

While in court for the above crime, defendant struck the deputy district attorney in the face with his fist and a pencil, stating "If you want a third strike case, I will give you one." The deputy district attorney received a puncture wound and scratch on the right cheek, and his cheekbone and lip were swollen. A few months later, while defendant was incarcerated in state prison, a correctional officer observed defendant papering over his cell window in violation of prison rules. Defendant refused to speak with the officer and insisted the officer summon someone from prison administration. Eventually, an associate warden arrived to speak with defendant. The associate warden squatted by the front window of defendant's cell in an attempt to speak with defendant through the food port door. Suddenly, there was a loud popping sound, like a gunshot, and the glass in the door's window exploded outward. The associate warden received a head laceration

requiring one stitch. A metal switch plate was recovered outside the door to defendant's cell.

Based on the attacks on the deputy district attorney and associate warden, defendant was charged in case No. 95F02375, with assault with a deadly weapon by a prisoner serving less than a life sentence, malicious assault with a deadly weapon by a state prisoner serving less than a life sentence, and two counts of battery on a nonconfined person by a prisoner. He was convicted by a jury of the lesser included offense of assault for his attack on the deputy district attorney, the lesser included offense of assault with a deadly weapon for his attack on the associate warden, and one count of battery on a nonconfined person by a prisoner. For these crimes, he was sentenced to two consecutive terms of 25 years to life, to be run consecutively to the 25-year-to-life term he was already serving.

Defendant petitioned the trial court for resentencing pursuant to section 1170.126 in both cases, though he did not seek resentencing for his conviction for assault with a deadly weapon on the associate warden.[2] The trial court denied defendant's petition, finding him ineligible for resentencing based on the existence of a disqualifying factor—that he was armed with a deadly weapon in the commission of his crimes—which it found by a preponderance of the evidence. The trial court found that in case No. 94F07904, the record revealed defendant had a sharpened stabbing weapon in his possession, and that his possession was sufficient to constitute arming for purposes of the three strikes law under the standard set forth in *People v. Bland* (1995) 10 Cal.4th 991. Additionally, it found in case No. 95F02375 that defendant had assaulted the deputy district attorney with a deadly weapon—the pencil, notwithstanding defendant's acquittal

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[2] Moreover, on appeal, defendant concedes his conviction for assault with a deadly weapon for the attack upon the associate warden rendered him ineligible for resentencing under section 1170.126 as to that conviction.

on the assault with a deadly weapon charge because the logic of *People v. Towne* (2008) 44 Cal.4th 63 (*Towne*) permitted the trial court to consider the facts presented in the absence of specific findings to the contrary.

DISCUSSION

Prior to enactment of the Three Strikes Reform Act of 2012 (the Act), a defendant who had two or more prior convictions for violent or serious felonies who was subsequently convicted of a felony, regardless whether it was violent or serious, had to be sentenced to a minimum of 25 years to life for that current conviction. (*People v. Johnson* (2015) 61 Cal.4th 674, 680 (*Johnson*).) As amended, however, the three strikes law provides that if the current conviction is for a felony that is not serious or violent, the defendant receives a second strike rather than a third strike sentence for that conviction, unless an exception applies. (*Id.* at p. 681.) One of these statutory exceptions applies when "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iv); *Johnson*, at p. 681.)

As relevant here, the Act also provided a procedure by which prisoners serving third strike sentences could gain the benefit of these new sentencing rules. (*Johnson*, *supra*, 61 Cal.4th at p. 682.) This procedure, codified in section 1170.126, permits an eligible inmate to seek resentencing if "[t]he inmate is serving an indeterminate term of life imprisonment imposed pursuant to [the three strikes law] for a conviction of a felony or felonies that are not defined as serious and/or violent . . . ." (§ 1170.126, subd. (e)(1).) However, an inmate is not eligible for resentencing if any of the exceptions set forth in section 667, subdivision (e)(2)(C) or section 1170.12, subdivision (c)(2)(C) apply. (§1170.126, subd. (e); *Johnson*, at p. 682.)

On appeal from the trial court's denial of his petition for resentencing pursuant to section 1170.126 based on its finding he was ineligible because he was armed with a deadly weapon in the commission of his current crimes (possession of a sharp instrument by a prisoner and assault and battery of the deputy district attorney), defendant contends his trial counsel rendered ineffective assistance by failing to argue the People had to plead and prove that he used or was armed with a deadly weapon in the crimes for which he seeks resentencing, that a jury had to make that factual finding beyond a reasonable doubt, and that defendant's acquittal of assault with a deadly weapon precludes a finding that he is ineligible for resentencing based on his using or being armed with a deadly weapon in his assault on the deputy district attorney. Because we find these arguments fail on the merits, we conclude defendant has not demonstrated the requisite prejudice to find counsel rendered ineffective assistance.

To establish a claim of ineffective assistance of counsel, defendant must prove that (1) trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant, meaning "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Williams* (1997) 16 Cal.4th 153, 215; *People v. Mai* (2013) 57 Cal.4th 986, 1009; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674].) If defendant makes an insufficient showing on *either* of these components, his ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703; see *Strickland, supra*, 466 U.S. at p. 687.) Additionally, when a contention fails on the merits, counsel does not render ineffective assistance by failing to raise that contention. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90.)

We first reject defendant's contention that the People had to plead and prove that he used or was armed with a deadly weapon in order for the trial court to find him

ineligible on that basis. "Several published cases have held that [the Act] does not contain a pleading and proof requirement with respect to factors that disqualify defendants from resentencing . . . ." (*People v. Chubbuck* (2014) 231 Cal.App.4th 737, 745.) Indeed, we so held in *Guilford, supra,* 228 Cal.App.4th at page 659. While there is an express pleading and proof requirement for both the existence of prior strike convictions and disqualifying factors in the initial sentencing of a new offense under the Act, there is no such express provision in section 1170.126 for recall and resentencing of a strike conviction. (*Guilford*, at pp. 656-657.) We see no reason to reach a different conclusion in the instant case.

Nor, contrary to defendant's contention otherwise, does the absence of a pleading and proof requirement violate defendant's constitutional rights to due process or a jury trial. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 803-804.) Determining whether an inmate is eligible for resentencing under section 1170.126 is not analogous to provisions that enhance a defendant's sentence beyond the statutory maximum but provides for downward modification of the original sentence, so factfinding in that proceeding does not implicate Sixth Amendment issues. (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1302-1304 (*Kaulick*); *Brimmer*, *supra*, at pp. 804-805.)

We also reject defendant's contention that he is entitled to have a jury make the factual findings rendering him ineligible beyond a reasonable doubt. As we stated in *Guilford, supra,* 228 Cal.App.4th at pages 662 to 663: "This contention already has been resolved against defendant. '[T]he United States Supreme Court has already concluded that its opinions regarding a defendant's Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening laws.' [Citations.] [¶] Contrary to defendant's view, nothing in *Alleyne v. United States* (2013) 570 U.S. ___ [186 L.Ed.2d 314] assists him.

As described by our Supreme Court, in *Alleyne*, 'the United States Supreme Court held that the federal Constitution's Sixth Amendment entitles a defendant to a jury trial, with a beyond-a-reasonable-doubt standard of proof, as to "any fact that increases the mandatory minimum" sentence for a crime.' [Citation.] The denial of a recall petition does not increase the mandatory minimum sentence for a defendant's crime." (See *People v. Hicks* (2014) 231 Cal.App.4th 275, 286 [the court properly makes factual determinations for purposes of deciding eligibility for resentencing under section 1170.126].) Nothing defendant argues persuades us otherwise.

Finally, we reject defendant's contention raised in his supplemental brief that his acquittal of the charged crime of assault with a deadly weapon in the attack on the deputy district attorney precludes a finding by the trial court that he was armed with a deadly weapon in that assault. Defendant cites to the recent case of *People v. Arevalo* (2016) 244 Cal.App.4th 836 for the proposition that ineligibility must be proven beyond a reasonable doubt and, by extension, that an acquittal on a charge or not true finding on an enhancement allegation precludes an ineligibility finding based on the facts alleged in support of the charge or allegation. We are not convinced.

Generally, it is the defendant's burden to make a prima facie showing that his conviction qualifies for resentencing. (*People v. Frierson* (2016) 1 Cal.App.5th 788, 793, review granted Oct. 19, 2016, S236728, cited for potentially persuasive value only.) But, if the People claim the defendant is ineligible for relief, the burden shifts to them to prove the disqualification. (*Ibid.*, cited for potentially persuasive value only; see *Kaulick*, *supra*, 215 Cal.App.4th at p. 1301.) The prevailing view appears to be that the People must prove this ineligibility by a preponderance of the evidence. (*People v. Newman* (2016) 2 Cal.App.5th 718, 729, review granted Nov. 22, 2016, S237491, cited for potentially persuasive value only; see *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040.) We are persuaded the prevailing view is the correct one. The general standard

under California law is a preponderance (Evid. Code, § 1115), and we are not persuaded a higher standard, let alone proof beyond a reasonable doubt, is constitutionally mandated to decline to reduce a defendant's constitutionally imposed sentence. Nor are we persuaded that an acquittal on a criminal charge or a finding of not true on an enhancement allegation precludes a finding of ineligibility under this less rigorous standard. (See *Towne, supra*, 44 Cal.4th at p. 86 [double jeopardy does not preclude a judge from considering conduct underlying a charge of which the defendant was acquitted in the absence of specific findings at sentencing, on revocation of probation or parole, or in subsequent actions applying a lower standard of proof].)

As we have concluded none of defendant's arguments are meritorious, he has failed to demonstrate the requisite prejudice to prevail on a claim of ineffective assistance of counsel. Nor has he demonstrated the trial court erred in denying his petition for resentencing.

DISPOSITION

The order denying defendant's petition for resentencing is affirmed.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.